No. 19-____

In the Supreme Court of the United States

ROBERT E. GARCIA, PETITIONER,

v.

MICHAEL FALK ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER R. FREDMONSKI
Counsel of Record
JULIE E. COHEN
ANDREW R. BEATTY
One Manhattan West
New York, NY 10001
(212) 735-3000
cfredmon@probonolaw.com

Counsel for Petitioner

QUESTION PRESENTED

This Court has explained that "nominal damages * * * are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308 n.11 (1986); see also *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978) ("Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." (internal citations omitted)).

The question presented is:

Whether it is an error of law to dismiss a constitutional claim brought under 42 U.S.C. 1983 on the grounds that the plaintiff has failed to establish a compensable injury.

PARTIES TO THE PROCEEDINGS

Petitioner Robert E. Garcia was the plaintiff in the district court and the appellant below.

Respondents Michael Falk, Victor Suero and Candace Benjamin were defendants in the district court and appellees below.

RELATED PROCEEDINGS

Garcia v. *Falk*, No. 09-CV-02045 (LDH) (LB), U.S. District Court for the Eastern District of New York. Judgment entered Sept. 26, 2018.

Garcia v. *Division of Parole*, No. 18-3240, U.S. Court of Appeals for the Second Circuit. Judgment entered Oct. 18, 2019, petition for rehearing denied Dec. 5, 2019.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases—continued: **Page(s)**

Cases—continued: **Page(s)**

Cases—continued: **Page(s)**

Statutes:

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

Robert E. Garcia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the court of appeals (App., *infra*, 1a–7a) is unreported and is available at 788 Fed. Appx. 796. The memorandum and order of the district court (App., *infra*, 8a–20a) granting petitioner's motion for partial summary judgment and granting respondents' cross-motion for summary judgment in part and dismissing petitioner's claim under 42 U.S.C. 1983 is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2019. A petition for rehearing was denied on December 5, 2019 (App., *infra*, 22a). This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * .

INTRODUCTION

This Court has long recognized that, in enacting 42 U.S.C. 1983, "Congress * * * meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961); see also *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972) ("Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."); accord *Imbler* v. *Pachtman*, 424 U.S. 409, 433 (1976) (White, J., concurring in the judgment). Section 1983 thus provides an avenue by which civil rights plaintiffs can "vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986).

Accordingly, this Court has articulated only two elements for establishing a *prima facie* case under section 1983:

> First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144, 150 (1970); see also *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980) ("By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute.").

In that connection, this Court explicitly has held that the denial of certain "absolute" rights, such as "the denial of procedural due process," "should be actionable for nominal damages without proof of actual injury." *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978); see also *Farrar* v. *Hobby*, 506 U.S. 103, 112 (1992) ("*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of his right to procedural due process but cannot prove actual injury."). The Court has not limited *Carey* to procedural due process claims; rather, the Court generally has "ma[de] clear that nominal damages * * * are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308 n.11 (1986).

For decades, the federal circuit courts of appeals have interpreted *Carey* as mandating that civil rights plaintiffs who have been subjected to either substantive or procedural constitutional deprivations be entitled to nominal damages, at a minimum. The Second Circuit has diverged and has imposed a "compensable injury" element to at least certain categories of substantive due process claims. Review from this Court is necessary to ensure that federal courts throughout the country continue to provide a "uniquely federal remedy" to parties subjected to constitutional deprivations at the hands of state officials, *Mitchum*, 407 U.S. at 239, even when the deprivation at issue "has not caused actual, provable injury," *Stachura*, 477 U.S. at 308 n.11.

STATEMENT

A. Factual background

1. Petitioner is one of many individuals affected by the New York State Department of Correctional Service's (DOCS) policy of administratively adding terms of post-release supervision (PRS) to the determinate sentences of defendants in the New York State court system. App., *infra*, 3a–4a.

Beginning in 1992, petitioner received several intersecting sentences in the New York State courts, which ultimately resulted in his serving, among other things, a period of PRS between January 17, 2008, and September 5, 2008. *Id.* at 4a. As relevant here, petitioner was sentenced on March 14, 2000 to a determinate term of 3.5 years for attempted robbery (the 2000 Sentence). *Ibid.* The sentencing judge did not pronounce a term of PRS as part of petitioner's 2000 Sentence. *Ibid.* However, DOCS subsequently added a five-year term of PRS to the 2000 Sentence in accordance with New York Penal Law § 70.45. *Ibid.* Petitioner entered DOCS custody in May 2000. *Id.* at 4a–5a.

On November 27, 2001, petitioner was conditionally released to the custody of the New York State Division of Parole (DOP) to begin serving his judicially unpronounced term of PRS. *Id.* at 5a. In May 2004, petitioner was declared delinquent by the DOP and charged in connection with two burglaries, causing his remaining PRS term to be held in abeyance. *Ibid.* On July 19 and July 28, 2005, petitioner was sentenced to two indeterminate terms of two-to-four years for burglary in the third degree, to run concurrently. *Ibid.* Petitioner reentered DOCS custody on August 15, 2005. *Ibid.*

2. On June 9, 2006, the U.S. Court of Appeals for the Second Circuit held that administratively imposed PRS terms violate "the due process guarantees of the United States Constitution." *Earley* v. *Murray*, 451 F.3d 71, 76 n.1 (2d Cir.) (*Earley I*), *reh'g denied*, 462 F.3d 147 (2d Cir. 2006) (*Earley II*). The court explained that, "as determined by the United States Supreme Court" in *Hill* v. *United States ex rel. Wampler*, 298 U.S. 460 (1936), "[o]nly the judgment of a court, as expressed through the sentence imposed by a judge, has the power to constrain a person's liberty." *Earley I*, 451 F.3d at 75–76; see also *Earley II*, 462 F.3d at 149 ("[T]he only sentence known to the law is the sentence imposed by the judge; any additional penalty added to that sentence by another authority is invalid, regardless of its source, origin, or authority until the judge personally amends the sentence.").

3. On January 17, 2008, petitioner was again conditionally released to DOP custody and began serving the remainder of his judicially unpronounced PRS term. App., *infra*, 5a. Petitioner continued serving that PRS term for 232 days until September 5, 2008, when he was declared delinquent by the DOP. *Ibid.* During that period, respondents enforced the terms and conditions of petitioner's judicially unpronounced PRS term. *Id.* at 11a–12a.

It is undisputed that, had petitioner not been subject to administratively imposed PRS from the 2000 Sentence between January 17 and September 5, 2008, he would instead have been subject to conditional release associated with his other prison sentences. *Id.* at 5a. It is further undisputed that the terms and conditions of that conditional release

would have been indistinguishable from the terms and conditions of his PRS. *Ibid.*

B. Procedural background

1. On April 27, 2009, petitioner commenced this action *pro se* under 42 U.S.C. 1983 seeking monetary damages for his unlawful PRS term. On January 26, 2017, after retaining *pro bono* counsel, petitioner filed an amended complaint limiting his claim to the 232 days of PRS he served in 2008.[1] *Id.* at 8a. Following discovery, the parties filed cross-motions for summary judgment. *Id.* at 8a–9a. Petitioner moved for partial summary judgment on the limited issue of whether he served administratively imposed PRS between January 17 and September 5, 2008. *Id.* at 14a. Respondents cross-moved for summary judgment to dismiss the action in its entirety. *Id.* at 19a.

The district court granted petitioner's motion for partial summary judgment, and held that, by operation of N.Y. Penal Law § 70.45, petitioner's judicially unpronounced PRS term automatically commenced when he was conditionally released to DOP custody on January 17, 2008, and continued to run until he was declared delinquent by the DOP on September 5, 2008. *Id.* at 18a.

The district court also granted respondents' cross-motion for summary judgment in part, reasoning that because petitioner "failed to adduce facts suggesting that the PRS he served was in any way more

---

[1] Petitioner's claim relates only to the 232 days of PRS he served in 2008 because the Second Circuit has held that qualified immunity bars any claims concerning judicially unpronounced PRS terms served prior to *Earley I*. See *Vincent* v. *Yelich*, 718 F.3d 157, 166 (2d Cir. 2013).

onerous than" the conditional release he otherwise would have served, but for DOCS's unlawful imposition of the five-year PRS term, petitioner's claim "must be dismissed for failure to establish a compensable injury." *Id.* at 19a–20a.

2. The Second Circuit affirmed. *Id.* at 3a. Relying on two recent decisions, *Hassell* v. *Fischer*, 879 F.3d 41 (2d Cir. 2018), and *Reyes* v. *Fischer*, 934 F.3d 97 (2d Cir. 2019), the court held that:

> in order to demonstrate a denial of due process rights for a period of administratively imposed PRS that is served prior to the expiration of a determinate sentence, a plaintiff must show that the conditions of PRS are in some respect "more onerous" than those to which the plaintiff would otherwise have been subject under conditional release.

App., *infra*, 6a.

REASONS FOR GRANTING THE PETITION

This case presents a significant and recurring question of federal law on which the federal circuit courts of appeals are now split: whether it is an error of law to dismiss a constitutional claim brought under 42 U.S.C. 1983 on the grounds that the plaintiff has failed to establish a compensable injury. Following this Court's decision in *Carey*, the federal circuit courts of appeals uniformly held that "compensable injury" is not an element of a section 1983 claim. The Second Circuit now has diverged and added an "adverse consequence" or "compensable injury" element to at least certain categories of due process claims. In so doing, the Second Circuit has created an unprecedented and potentially insur-

mountable hurdle for certain plaintiffs with otherwise valid due process claims who cannot establish an "adverse consequence" or "compensable injury," and has opened the door to imposing this hurdle on civil rights plaintiffs generally. The ability to vindicate federal constitutional rights should not vary by geography. This case presents an ideal opportunity for resolving a conflict of national importance and warrants this Court's review.

A. The decision below has created a conflict concerning the availability of nominal damages to vindicate constitutional deprivations

Section 1983 provides "a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961). The *Monroe* Court, construing the statutory phrase "under color of state law," made clear that section 1983 provides a remedy for "[m]issue of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," whether the official acts "by reason of prejudice, passion, neglect, intolerance or otherwise." *Id.* at 180, 184 (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)).

In *Carey* v. *Piphus*, 435 U.S. 247 (1978), this Court "consider[ed] the elements and prerequisites for recovery of damages by students who were suspended from public elementary and secondary schools without procedural due process." *Id.* at 248. The *Carey* Court explained:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights

> that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed * * * .

Id. at 266. Accordingly, the Court held that, on remand, even if the district court determined that the students' suspensions were justified, because the students were suspended without procedural due process, they "nevertheless w[ould] be *entitled* to recover nominal damages not to exceed one dollar." *Id.* at 266–267 (emphasis added).

Subsequently, this Court reiterated that "nominal damages * * * are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308 n.11 (1986).

Since *Carey*, an overwhelming majority of the circuit courts of appeals have held that *Carey* applies to constitutional deprivations generally, such that plaintiffs suffering constitutional violations can establish a defendant's liability through section 1983 even if an analogous state law tort would be dismissed for lack of compensability. The Second Circuit now has changed course by holding that certain categories of substantive due process claims must be dismissed unless a section 1983 plaintiff can establish an "adverse consequence" from the alleged constitutional deprivation. *Hassell* v. *Fischer*, 879 F.3d 41, 52 (2d Cir. 2018).

1. Prior to the Second Circuit's recent decisions in *Hassell* and its progeny, the federal circuit courts

of appeals consistently interpreted *Carey* as requiring an award of nominal damages when a civil rights plaintiff establishes a constitutional deprivation but is unable to prove compensable injury.

For example, in *Draper* v. *Coombs*, 792 F.2d 915 (9th Cir. 1986), the Ninth Circuit followed the lead of the Tenth Circuit and held that, "[f]or purposes of *Piphus*, it does not matter whether the underlying claim involves a deprivation of a procedural or substantive constitutionally-based right." *Id.* at 921. The Ninth Circuit explained that "any procedural rights/substantive rights distinction [i]s unhelpful and contrary to the underlying rationale of *Piphus*." *Id.* at 921–922 (citing *Lancaster* v. *Rodriguez*, 701 F.2d 864, 866 (10th Cir. 1983)). Thus, the court held that even if the plaintiff "did not suffer actual damages as a result of the unlawful extradition" because he was "ultimately convicted of the crime involved," "his complaint stated valid section 1983 claims for nominal damages." *Id.* at 921–922; accord *Floyd* v. *Laws*, 929 F.2d 1390, 1402 (9th Cir. 1991).

Other courts of appeals likewise have interpreted *Carey*'s mandate broadly, and have held that *Carey* applies with equal force to section 1983 claims involving, among other things, (i) deprivations of freedoms guaranteed by the First Amendment, [2]

---

[2] See, *e.g.*, *Cortés-Reyes* v. *Salas-Quintana*, 608 F.3d 41, 53 n.15 (1st Cir. 2010); *KH Outdoor, LLC* v. *City of Trussville*, 465 F.3d 1256, 1260–1261 (11th Cir. 2006); *Allah* v. *Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000); *Risdal* v. *Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000); *Committee for First Amendment* v. *Campbell*, 962 F.2d 1517, 1526–1527 (10th Cir. 1992); *Familias Unidas* v. *Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980).

(ii) unreasonable searches and seizures[3] (iii) an official's use of excessive force or cruel and unusual punishment[4] and (iv) other civil rights claims generally.[5] In addition, the Third, Fifth and Ninth Circuits explicitly have recognized that nominal damages are available in connection with substantive due process claims. See *Johnson* v. *Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1018–1019 (9th Cir. 2010); *Davis* v. *W. Cmty. Hosp.*, 755 F.2d 455, 465 (5th Cir. 1985); *United States ex rel. Tyrrell* v. *Speaker*, 535 F.2d 823, 829–830 (3d Cir. 1976).

2. Until recently, the Second Circuit was in accord with the other circuit courts of appeals. See, *e.g.*, *Amato* v. *City of Saratoga Springs*, 170 F.3d 311, 318–319 (2d Cir. 1999) ("Since *Carey* was decided, we have * * * clarified that its principle extends not only to procedural but to substantive constitutional rights."). However, in 2018, the Second Circuit changed course and held that, at least with respect to certain categories of substantive due process

---

[3] See, *e.g.*, *Stoedter* v. *Gates*, 704 Fed. Appx. 748, 761 (10th Cir. 2017); *Kane* v. *Lewis*, 604 Fed. Appx. 229, 237 (4th Cir. 2015); *G.C.* v. *Owensboro Pub. Sch.*, 711 F.3d 623, 634 (6th Cir. 2013); *Henderson* v. *Belfueil*, 197 Fed. Appx 470, 475 (7th Cir. 2006); *Garrett* v. *Clarke*, 147 F.3d 745, 747 (8th Cir. 1998); *George* v. *City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992); *Melear* v. *Spears*, 862 F.2d 1177, 1186 (5th Cir. 1989); *Aubin* v. *Fudala*, 782 F.2d 280, 286 (1st Cir. 1983).

[4] See, *e.g.*, *Calhoun* v. *DeTella*, 319 F.3d 936, 941–942 (7th Cir. 2003); *Slicker* v. *Jackson*, 215 F.3d 1225, 1231–1232 (11th Cir. 2000); *Cowans* v. *Wyrick*, 862 F.2d 697, 699 (8th Cir. 1988); *Lancaster*, 701 F.2d at 865–866.

[5] See, *e.g.*, *Kelly* v. *Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994); *Farrar* v. *Cain*, 756 F.2d 1148, 1152 (5th Cir. 1985).

claims, civil rights plaintiffs must be able to establish a compensable injury to survive summary judgment. See *Hassell*, 879 F.3d at 52.

In *Hassell*, the Second Circuit provided no explanation for its inexplicable departure from *Carey* and prior precedent. Rather, the court *sua sponte* observed that the plaintiff "ha[d] made no showing that the conditions of his PRS term were in any respect more onerous than those of conditional release would have been," and held that "[w]ithout any showing of an adverse consequence during the three months [in which the plaintiff served PRS], [the plaintiff] has not suffered a denial of his due process rights * * * ."[6] *Ibid.* The sole authority cited by the *Hassell* court in support of its novel "adverse consequence" requirement is *United States* v. *Ray*, 578 F.3d 184 (2d. Cir. 2009), which the Second Circuit cited for the proposition that "[t]o prove a due process violation *as a result of a sentencing delay*, the prejudice claimed by the defendant . . . must be substantial and demonstrable." *Hassell*, 879 F.3d at 52 (emphasis added) (quoting *Ray*, 578 F.3d at 200). As discussed below (see *infra* § B(3)), *Ray* is inapposite to the claims at issue in *Hassell* and those at issue here. Indeed, in a dissenting opinion in *Reyes* v. *Fischer*, 934 F.3d 97 (2d Cir. 2019), in which the Second Circuit reaffirmed the rule announced in *Hassell*, Judge Hall

---

[6] See *Reyes* v. *Fischer*, 934 F.3d 97, 109 (2d Cir. 2019) (Hall, J., concurring in part and dissenting in part) (observing that the plaintiff in *Hassell* "did not even argue that he was deprived of due process by being subjected to administratively imposed PRS when he otherwise would have been subjected to conditional release," and that "the Court in *Hassell* thus did not have the benefit of full adversarial briefing on the issue").

observed that there is "no support in [the Second Circuit's] precedent for imposing" an "adverse consequence" requirement on a subset of due process claims. *Reyes*, 934 F.3d at 109 (Hall, J., concurring in part and dissenting in part).

3. The split created by the Second Circuit's decisions in *Hassell* and *Reyes*, as well as in the decision below, is unlikely to resolve itself without this Court's intervention, as the Second Circuit denied a petition for rehearing in this case. App., *infra*, 21a.

B. The decision below is wrong

The decision below ignored this Court's precedents in *Carey* and *Stachura* in dismissing petitioner's due process claim on the grounds that he could not establish a compensable injury stemming from his judicially unpronounced (and unlawful) PRS term. App., *infra*, 6a–7a; see *Reyes*, 934 F.3d at 108 (Hall, J., concurring in part and dissenting in part) (observing that "[t]he majority sidestep[ped]" *Carey* "by relying on language from" *Hassell*). The decision below is wrong, because compensable injury is not an element of a constitutional claim under section 1983; rather, the only elements of a section 1983 cause of action are (1) a deprivation of a right "secured by the Constitution and laws" of the United States and (2) that the defendant deprived the plaintiff of this right "under color of" law. 42 U.S.C. 1983; see *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150 (1970).

1. As a threshold matter, *Hassell* itself does not support the imposition of a "compensable injury" element to the due process claim at issue here. Relying on *Hassell*, the court below held that, "in order to demonstrate a denial of due process rights for

a period of administratively imposed PRS that is served prior to the expiration of a determinate sentence, a plaintiff must show that the conditions of PRS are in some respect 'more onerous' than those to which the plaintiff would otherwise have been subject under conditional release." App., *infra*, 6a (citing *Hassell*, 879 F.3d at 52). In other words, the court held that *Hassell*'s "more onerous" or "adverse consequence" requirement is an element of establishing a due process deprivation in the first instance, rather than a prerequisite to obtaining compensatory damages. See *ibid.* ("*Hassell* * * * made clear that the 'more onerous' standard is not only a question of damages, but also one of liability." (quoting *Reyes*, 934 F.3d at 106)); cf. *Carey*, 435 U.S. at 255 ("[D]amages are available under [section 1983] for actions 'found * * * to have been violative of * * * constitutional rights *and to have caused compensable injury* * * * .'" (citation omitted)).

However, the rule announced in *Hassell* (and applied below) cannot be reconciled with the *Hassell* decision itself. Specifically, prior to determining that the plaintiff "ha[d] not suffered a denial of his due process rights," *Hassell*, 879 F.3d at 52, the *Hassell* court held that the defendants were not entitled to qualified immunity, *see id.* at 50–51. This conclusion "necessarily entails findings both that the defendants *did* violate [the plaintiff's] constitutional rights and that those rights were clearly established." *Reyes*, 934 F.3d at 109 (Hall, J., concurring in part and dissenting in part) (citation omitted); see also *Ashcroft* v. *Al-Kidd*, 563 U.S. 731, 735 (2011) ("Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official *violated a statutory or*

constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." (emphasis added) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982))).

In other words, the Second Circuit in *Hassell* simultaneously and irreconcilably concluded that the plaintiff both (i) established a constitutional violation and (ii) could not establish a constitutional violation.

2. *Hassell*'s implicit finding of a due process violation is the correct one. This Court long ago held that "[t]he only sentence known to the law is the sentence or judgment entered upon the records of the court." *Hill* v. *United States ex rel. Wampler*, 298 U.S. 460, 464 (1936) (Cardozo, J.); see also *id.* at 462, 465–466 (holding that the clerk of the court did not have the power to alter the sentence imposed by the court to add a condition that the defendant remain in custody until the court-imposed $5,000 fine was paid).

This Court's decision in *Wampler* forms the genesis of petitioner's claim here (and the claims at issue in *Hassell* and *Reyes*), which relates to the wrongful imposition and enforcement of a judicially unpronounced term of PRS. See *Earley* v. *Murray*, 451 F.3d 71, 74 (2d Cir. 2006) (*Earley I*) ("Seventy years ago, the Supreme Court established that the sentence imposed by the sentencing judge is controlling; it is this sentence that constitutes the court's judgment and authorizes the custody of a defendant." (citing *Wampler*, 298 U.S. 460)); see also *Vincent* v. *Yelich*, 718 F.3d 157, 160 (2d Cir. 2013) ("*Earley I* * * * clearly establish[ed] the unconstitutionality of the administrative imposition or enforcement of

postrelease conditions that were not judicially imposed.").

3. *Hassell* cannot be squared with these decisions. As Judge Hall observed in his dissenting opinion in *Reyes*:

> *Hassell* can be read to present its supposed "more onerous" requirement as an afterthought; it presents no rationale as to why an individual's liberty interest in being free from the administrative (non-judicial) imposition of PRS in the first instance might become nonexistent when, as here, that individual would otherwise be subjected to conditional release.

Reyes, 934 F.3d at 109 (Hall, J., concurring in part and dissenting in part) (internal citation omitted).

To that end, to support its unprecedented "adverse consequence" requirement, the *Hassell* court cited a single, inapposite decision concerning sentencing delays in criminal cases. See *Hassell*, 879 F.3d at 52 (citing *Ray*, 578 F.3d at 200). In *Ray*, the Second Circuit applied the framework set forth in this Court's decision in *United States* v. *Lovasco*, 431 U.S. 783 (1977), to hold that a fifteen-year delay in the plaintiff's resentencing (while the plaintiff was released on bail) constituted a due process violation. See *Ray*, 578 F.3d at 199–202. In *Lovasco*, the Court held that the trial court erred in dismissing a criminal indictment on the basis of a eighteen-month delay between the date the criminal offenses were alleged to have occurred and the date the criminal defendant was indicted for committing them. *Lovasco*, 431 U.S. at 784, 796.

Lovasco and *Ray* are distinguishable. In those cases, the key inquiry was whether a "delay in criminal proceedings * * * 'violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.'" *Ray*, 578 F.3d at 199 (quoting *Lovasco*, 431 U.S. at 790). Because there is nothing *per se* unconstitutional about criminal proceedings *ab initio*, and with no explicit time constraints in the Constitution to guide what constitutes a "delay" in criminal proceedings, courts rightfully "must consider the reasons for the delay as well as the prejudice to the accused" to determine whether an alleged delay in criminal proceedings offends "the community's sense of fair play and decency" and thus constitutes a due process violation. *Lovasco*, 431 U.S. at 790 (citation omitted); see also *Betterman* v. *Montana*, 136 S. Ct. 1609, 1617–1618 (2016) (explaining that in "the third phase of the criminal-justice process, *i.e.*, between conviction and sentencing," "due process serves as a backstop against exorbitant delay").

In contrast, the claim at issue here relates to a sentencing condition that was not pronounced by a court but nonetheless was imposed and enforced by the New York Department of Corrections and Division of Parole, respectively. App., *infra*, 3a–4a, 8a. As this Court held in *Wampler*, the judgment of the court establishes a defendant's sentence, and that sentence may not be increased by an administrator's amendment. See *Wampler*, 298 U.S. at 464–465. Accordingly, because respondents, acting "under color of" law, enforced postrelease conditions in contravention of "the Constitution and laws" of the United States, 42 U.S.C. 1983, the inquiry should

end there. See *Vincent*, 718 F.3d at 160. *Hassell*'s imposition of an "adverse consequence" requirement on claims like petitioner's thus was an error.

Because the rule announced in *Hassell* cannot be reconciled with section 1983, *Carey*, *Wampler* or *Hassell* itself, the decision below, which applied the rule announced in *Hassell* to the letter, should be reversed.

C. This case is an ideal opportunity to resolve a recurring federal question of substantial importance

1. Decades ago, this Court "reject[ed] the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated." *City of Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986). To the contrary, "[u]nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Ibid.* To that end, section 1983 "remains a crucial vehicle for plaintiffs to protect certain fundamental constitutional rights," and "nominal damages exist as a crucial tool to vindicate constitutional violations." Mark T. Morrell, Comment & Note, *Who Wants Nominal Damages Anyway? The Impact of an Automatic Entitlement to Nominal Damages Under § 1983*, 13 Regent U. L. Rev. 225, 231 (2000–2001). "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed[.]" *Carey*, 435 U.S. at 266.

By holding that civil rights plaintiffs like petitioner cannot establish a due process deprivation

unless the plaintiff can prove a compensable injury stemming from the alleged deprivation, the Second Circuit has created an unprecedented and potentially insurmountable hurdle for civil rights plaintiffs to vindicate at least certain categories of constitutional deprivations. But the Second Circuit's rule ignores that "nominal damages 'are not compensation for loss or injury, but rather recognition of a violation of rights.'" *Calhoun* v. *DeTella*, 319 F.3d 936, 941 (7th Cir. 2003) (citation omitted). And, oftentimes, nominal damages "may be the only available remedy to the plaintiff for a constitutional violation." Maura B. Grealish, Note, *A Dollar for Your Thoughts: Determining Whether Nominal Damages Prevent an Otherwise Moot Case from Being an Advisory Opinion*, 87 Fordham L. Rev. 733, 741 (Nov. 2018).

The Second Circuit's decision has the potential to impact a great many cases other than this one and create uncertainty for courts concerning the availability of nominal damages to vindicate constitutional deprivations. Indeed, district courts within the Second Circuit appear to have begun questioning whether the "compensable injury" rule announced in *Hassell* has application outside of the PRS context. See, *e.g.*, *Salem* v. *City of New York*, No. 17 Civ. 4799 (JGK), 2018 WL 3650132, at *6 n.5 (S.D.N.Y. Aug. 1, 2018) ("[T]he Court notes that because Salem was given credit towards his post-conviction sentence for the time he spent in jail as a pretrial detainee, it is unclear whether he was deprived of any liberty interest." (citing *Hassell*, 879 F.3d at 51)).

2. This case presents an ideal opportunity to clarify that it is an error of law to dismiss a constitutional claim brought under section 1983 on

the grounds that the plaintiff has failed to establish a compensable injury. There is no dispute about the jurisdiction of either lower court. There are no disputed factual questions. All relevant issues were raised and preserved on appeal. There are no alternative state-law grounds of decision to support the judgment. The conflict created by the Second Circuit's decisions in *Hassell* and its progeny is squarely presented and free from any threshold questions. It warrants this Court's immediate review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

CHRISTOPHER R. FREDMONSKI
Counsel of Record
JULIE E. COHEN
ANDREW R. BEATTY
One Manhattan West
New York, NY 10001
(212) 735-3000
cfredmon@probonolaw.com

Counsel for Petitioner

MARCH 2020

APPENDIX

APPENDIX A

18-3240
Garcia v. Falk et al.
[Filed 10/18/2019]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of October, two thousand nineteen.

Present:

PIERRE N. LEVAL,

DEBRA ANN LIVINGSTON,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

ROBERT E. GARCIA,

Plaintiff-Appellant,

v. 18-3240

MICHAEL FALK, Area Supervisor, Queens III Parole, VICTOR SUERO, Parole Officer, CANDACE BENJAMIN, Sr. Parole Officer,

Defendants-Appellees,

DIVISION OF PAROLE, EXECUTIVE DEPARTMENT, NEW YORK STATE DEPARTMENT OF CORRECTIONS, AMES, Parole Officer, R. CHONG, Sr. Parole Officer,

Defendants.

For Plaintiff-Appellant: ANDREW R. BEATTY, CHRISTOPHER R. FREDMONSKI & ALEXANDER C. HADEN, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY.

For Defendants-Appellees: DAVID S. FRANKEL, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Steven C. Wu, Deputy Solicitor General, on the brief), *for* Letitia James, Attorney General, New York, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Hall, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Robert E. Garcia ("Garcia") appeals from a September 26, 2018 decision and order granting Defendants-Appellees' cross-motion for summary judgment and dismissing Garcia's 42 U.S.C. § 1983 claim on the grounds that, under the rule of *Hassell v. Fischer*, 879 F.3d 41 (2d Cir. 2018), Garcia failed to establish a due process violation stemming from Defendants-Appellees' enforcement of his post-release supervision.

We review a district court's grant of summary judgment *de novo*, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 127 (2d Cir. 2013) (per curiam). "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Garcia is one of many individuals affected by the New York State Department of Correctional Service's

("DOCS")[1] policy of administratively adding terms of post-release supervision ("PRS") to the determinate sentences of defendants in the New York state court system. This practice began in the wake of a sentencing reform statute passed by the New York State legislature in 1998, which required determinate sentences to be followed by a period of PRS, but did not require state court judges to pronounce the PRS term at sentencing. *See* N.Y. Penal Law § 70.45(1). DOCS subsequently began unilaterally calculating and imposing PRS terms without consulting the sentencing judge in cases where the sentencing judge had not imposed the statutorily required term of PRS. In 2006, the Second Circuit deemed this practice unconstitutional. *See Earley v. Murray*, 451 F.3d 71, 75-77, 76 n.1 (2d Cir. 2006), *reh'g denied*, 463 F.3d 147 (2d Cir. 2006).

Beginning in 1992, Garcia received numerous intersecting sentences in the New York state courts which ultimately resulted in his serving, *inter alia*, a period of PRS between January 17, 2008 and September 5, 2008. As relevant here, he was sentenced on March 14, 2000 to a determinate term of 3.5 years for attempted robbery (the "2000 Sentence"). The sentencing judge did not orally pronounce a PRS term at the sentencing hearing. DOCS subsequently added a five-year term of PRS to the 2000 Sentence in accordance with New York Penal Law § 70.45(2). Garcia entered custody in

---

[1] The New York State Department of Correctional Services ("DOCS") and the Division of Parole ("DOP") merged in 2011 to become the New York State Department of Corrections and Community Supervision ("DOCCS"). For the relevant years in this appeal, however, the agencies operated separately.

May 2000. On November 27, 2001, he was conditionally released to DOP to begin serving his term of PRS.

In May 2004, Garcia was found delinquent by the DOP and charged in connection with two burglaries, causing his remaining PRS term to be held in abeyance. On July 19 and July 28, 2005, he was sentenced to two indeterminate terms of two-to-four years for burglary in the third degree, to run concurrently. The maximum expiration date for that sentence was August 21, 2009. He reentered DOCS custody on August 15, 2005 and was conditionally released to resume the PRS term from the 2000 Sentence on January 17, 2008, while his numerous other sentences were held in abeyance. Garcia continued serving PRS until September 5, 2008, at which point he was declared delinquent by DOP, thereby interrupting his period of PRS.

Had Garcia not been subject to administratively imposed PRS from the 2000 Sentence between January 17, 2008 and September 5, 2008, it is undisputed that he would have instead been subject to conditional release, because August 21, 2009—the maximum expiration date of his judicially pronounced sentences—had not yet passed. Furthermore, it is undisputed that the terms and conditions of that conditional release would have been indistinguishable from the terms and conditions of his supervision under PRS.

In light of these characteristics of the term of PRS served by Garcia, the district court concluded that Garcia's claim must fail under *Hassell v. Fischer*. In *Hassell*, this Court vacated an award of nominal damages for administratively imposed PRS served

during a period when the plaintiff would have otherwise been subject to conditional release because the plaintiff had "made no showing that the conditions of his PRS term were in any respect more onerous than those of conditional release would have been." *Hassell*, 879 F.3d at 52. Absent that "showing of an adverse consequence," the plaintiff in that case had "not suffered a denial of his due process rights during that period." *Id.* The district court determined that *Hassell* was factually indistinguishable from this case and squarely foreclosed liability.

We agree. *Hassell* made clear that in order to demonstrate a denial of due process rights for a period of administratively imposed PRS that is served prior to the expiration of a determinate sentence, a plaintiff must show that the conditions of PRS are in some respect "more onerous" than those to which the plaintiff would otherwise have been subject under conditional release. *Id.* This reading of *Hassell* was confirmed by this Court's recent decision in *Reyes v. Fischer*, 934 F.3d 97 (2d Cir. 2019), which found that "unresolved factual questions as to whether the conditions of administratively imposed PRS [were] more onerous than the conditions of conditional release" were "crucial to the disposition" of the case because "*Hassell* . . . made clear that the 'more onerous' standard is not only a question of damages, but also one of liability," *id.* at 106. Here, unlike in *Reyes*, no further factual development is necessary, as discovery is complete and the parties agree that Garcia adduced no facts showing that the conditions of his PRS were "more onerous" than those of conditional release. In light of the two recent

precedential decisions of this Court establishing that a "more onerous" showing is necessary in order to establish a due process violation in these circumstances, we conclude that summary judgment in Defendants-Appellees' favor was appropriate.

We have considered Garcia's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolf, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed 09/26/19]

----------x

ROBERT E. GARCIA,

Plaintiff,

-against-

PAROLE AREA SUPERVISOR MICHAEL FALK, PAROLE OFFICER VICTOR SUERO, and PAROLE OFFICER CANDACE BENJAMIN,

Defendants.

----------x

MEMORANDUM AND ORDER

09-CV-02045 (LDH) (LB)

LASHANN DEARCY HALL, United States District Judge:

Plaintiff Robert Garcia brings this action against Defendants Parole Area Supervisor Michael Falk, Parole Officer Victor Suero, and Parole Officer Candace Benjamin (collectively, "Defendants") alleging a violation of 42 U.S.C. § 1983. Specifically, Plaintiff alleges that Defendants implemented, enforced, and effectuated a policy, practice, and custom to which Plaintiff was impermissibly subject to post-release supervision ("PRS") not authorized by any sentencing court. Plaintiff moves and

Defendants cross move, pursuant to Federal Rule of Civil Procedure 56, for summary judgment.[1]

BACKGROUND

On April 27, 1992, Plaintiff received an indeterminate sentence[2] of 2.5-5 years from the sentencing judge for criminal possession of a controlled substance in the fifth degree and a 1-year sentence for criminal impersonation in the second degree. (Pl.'s Opp'n Rule 56.1 Statement ¶ 15, ECF No. 84-1.) The two sentences were to be served concurrently. (*Id.*) Plaintiff's maximum expiration date[3] was April 3, 1997. (*Id.* at ¶ 17.) At some point, Plaintiff was released as part of New York State Department of Corrections and Community Supervision's ("DOCS") Temporary Release Program. (*Id.* at ¶ 18.) On November 17, 1993, while on release, Plaintiff was arrested for burglary. (*Id.*)

On February 3, 1994, Plaintiff received an indeterminate sentence of 2-4 years from the sentencing judge, as a second felony offender,[4] for

---

[1] Plaintiff moves for partial summary judgment. Defendants move to dismiss the action in its entirety.

[2] An indeterminate sentence consists of a maximum and minimum term of imprisonment. The minimum term of imprisonment is the soonest an individual is eligible for parole.

[3] The maximum expiration date represents the date that an "individual's legal obligations to serve a custodial sentence or period of parole supervision ends." New York State Department of Corrections and Community Supervision, *Inmate Information Data Definitions*, http://www.doccs.ny.gov/univinq/fpmsdoc.htm.

[4] "A second felony offender is, as the name implies, someone who has a prior felony conviction. In such a case, the sentencing court must impose an enhanced sentence, based solely on the fact of the prior felony conviction." *James v. Artus*, No. 03-

burglary in the third degree. (*Id.* at ¶ 19.) The 1994 sentence ran consecutively to the 1992 sentence. (*Id.* at ¶ 20.) After receiving credit for the time spent in local custody, Plaintiff's maximum expiration date was March 24, 2001. (*Id.* at ¶¶ 21-22.) In March of 1998, Plaintiff was conditionally released [5] from DOCS to the New York State Division of Parole ("Parole"). (*Id.* at ¶ 23.) Subsequently, prior to the conclusion of Plaintiff's conditional release, he was declared delinquent on December 2, 1998 and charged with attempted robbery. (*Id.* at ¶¶ 24-25.)

On March 14, 2000, Plaintiff received a determinate sentence of 3.5 years from Judge Ira Wexner, as a second felony offender, for attempted robbery in the second degree. (*Id.* at ¶ 25; Michael Keane Declaration ("Keane Decl.") Ex. A at 15, ECF No. 92-1.) Following his sentencing hearing, in accordance with the version of Penal Law § 70.45(2) in effect at the time, a five-year term of PRS was added to Plaintiff's sentence. (*Id.* at ¶ 26.) After receiving credit for the time spent in local custody, Plaintiff's maximum expiration date for the 2000 sentence was May 29, 2002; and, the maximum

---

CV-7612, 2005 WL 859245, at *15 (S.D.N.Y. Apr. 15, 2005) (internal citation omitted).

[5] An individual can successfully request to be conditionally released from his respective institution "when the total good behavior time allowed to him . . . is equal to the unserved portion of his [] term, maximum term or aggregate maximum term." N.Y. Penal Law § 70.40(1)(b). The supervision shall continue "for a period equal to the unserved portion of the term, maximum term, aggregate maximum term, or period of post-release supervision." *Id.*

expiration date for the 1992 and 1994 sentences was September 9th or 10th of 2002. (*Id.* at ¶¶ 28-29.)

Prior to the expiration of his sentence, on November 27, 2001, Plaintiff was released to PRS. (*Id.* at ¶¶ 30-31.) At the time of his release to PRS, Plaintiff's maximum expiration date for the PRS component of his sentence was November 27, 2006. (*Id.* at ¶ 33.) Approximately one year and a half prior to completing his term of PRS, Plaintiff was declared delinquent by parole on May 8, 2004. (*Id.* at ¶ 34.) In addition, he was charged in connection with two burglaries. (*Id.* at ¶¶ 35-36.)

In July of 2005, Plaintiff was sentenced separately for each burglary. *First*, on July 19, 2005, Plaintiff received an indeterminate sentence of 2-4 years, from the sentencing judge in New York County, for burglary in the third degree. (*Id.* at ¶ 35.) *Second*, on July 28, 2005, Plaintiff received an indeterminate sentence of 2-4 years, from the sentencing judge in Queens County, for burglary in the third degree. (*Id.* at ¶ 36.) The two sentences ran concurrently with each other, but ran consecutively to the sentencings that took place in 1992, 1994, and 2000. (*Id.* at ¶ 37.) After receiving credit for the time spent in local custody, Plaintiff's maximum expiration date for the 2005 sentences was August 21, 2009. (*Id.* at ¶¶ 38-39.)

On January 17, 2008, Plaintiff was again conditionally released from DOCS to Parole on PRS. (*Id.* at ¶ 40.) At that time, Defendants were responsible for enforcing the terms of Plaintiff's release. (Defs.' Reply Rule 56.1 Statement ¶ 71, ECF No. 106.) At some point in 2008, following his release, Plaintiff complained to Defendant Suero

about the imposition of his PRS term. (*Id.* ¶ 72.) Although it was Defendant Suero's usual practice to report parolees' complaints about PRS to his supervisor (*id.* ¶ 73.), Plaintiff testified that Suero instructed him to "take [his complaint] up with the courts," (Pl.'s Opp'n Rule 56.1 Statement ¶ 72).

On September 5, 2008, Plaintiff was declared delinquent by Parole. (*Id.* at ¶ 41.) Subsequently, on September 25, 2008, Plaintiff entered local custody, in part because of his delinquency, and in part because of burglary and larceny charges.[6] (*Id.* at ¶¶ 45-46, 48.) While Plaintiff was in local custody, on October 14, 2008, Parole referred Plaintiff to Judge Wexner and identified Plaintiff as someone who may require resentencing. (*Id.* at ¶ 62.) Then, on January 20, 2009, Judge Steven Jaeger issued an amended sentence and commitment order for Plaintiff's 2000 sentence, which indicated that the 2000 sentence was not subject to PRS. (*Id.* at ¶ 42; Keane Decl. Ex. A. at 20.)

STANDARD OF REVIEW

Summary judgment must be granted when there is "no genuine dispute as to any material fact and the movant[s] [are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v.*

---

[6] On October 13, 2009, Plaintiff was sentenced by the supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 3.5-7 years for burglary in the third degree and an indeterminate sentence of 2-4 years for grand larceny in the fourth degree. (Pl.'s Opp'n Rule 56.1 Statement at ¶ 46.) The two sentences ran consecutively. (*Id.* at ¶ 47.) Following the sentencing on October 22, 2009, Plaintiff was transferred from local custody to DOCS custody. (*Id.* at ¶ 48.)

Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The movants bear the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004). Where the non-movant bears the burden of proof at trial, the movants' initial burden at summary judgment can be met by pointing to a lack of evidence supporting the non-movant's claim. *Celotex Corp.*, 477 U.S. at 325.

Once the movants meet their initial burden, the non-movant may defeat summary judgment only by producing evidence of specific facts that raise a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *see also Anderson*, 477 U.S. at 250; *Davis v. New York*, 316 F.3d 93, 100 (2d Cir. 2002). The Court is to believe the evidence of the non-movant and draw all justifiable inferences in his favor, *Anderson*, 477 U.S. at 255, but the non-movant must still do more than merely assert conclusions that are unsupported by arguments or facts. *Castro v. Cty. of Nassau*, 739 F. Supp. 2d 153, 165 (E.D.N.Y. 2010) (citing *Bellsouth Telecomms., Inc. v. W.R. Grace & Co.*, 77 F.3d 603, 615 (2d Cir. 1996)). That is, the non-movant cannot survive summary judgment merely by relying on the same conclusory allegations set forth in his complaint. *See Murphy v. Lajaunie*, No. 13-CV-6503, 2016 WL 1192689, at *2 (S.D.N.Y. Mar. 22, 2016) (citing *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998)).

DISCUSSION

I. Plaintiff Served Administratively-imposed PRS between January 17, 2008 and September 5, 2008.

Plaintiff maintains that he is entitled to summary judgment on the limited issue of whether he served administratively-imposed PRS between January 17, 2008 and September 5, 2008. (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. and in Supp. of Mot. for Partial Summ. J. ("Pl.'s Opp'n MOL") at 10-14, 24, ECF 102.) The Court agrees.

In 1998, the New York legislature enacted Jenna's Law, codified as N.Y. Penal Law § 70.45, which required the imposition of PRS as a mandatory follow-up period to a determinate sentence for violent felony offenders. *See Garcia v. Falk*, No. 09-CV-2045, 2015 WL 1469294, at *1 (E.D.N.Y. Mar. 30, 2015) (internal quotations and citations omitted). For several years, in accordance with N.Y. Penal Law § 70.45, DOCS administratively imposed PRS when the sentencing court failed to do so after imposing a determinate sentence.[7] *Id.* And, New York courts routinely upheld the administrative imposition of PRS. *Id.*

In *Earley v. Murray* ("*Earley I*"), the long-held practice of administratively-imposing PRS was challenged by petitioner Sean Earley. 451 F.3d 71 (2d Cir. 2006). At the state level, Earley had pleaded guilty pursuant to a plea agreement and received a six-year determinate sentence. *Id.* at 72. The

---

[7] N.Y. Penal Law § 70.45(1999) stated, "[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision."

sentencing judge did not impose PRS. *Id.* After his sentencing, PRS was imposed administratively. *Id.* Upon learning of the imposition of PRS, Earley moved in state court to have the term of supervision removed; his motion was denied. *Id.* Subsequently, his petition for a writ of habeas corpus to the district court on the same grounds was also denied. *Id.* On appeal, the Second Circuit vacated the judgment of the district court and held that under the "clearly established Supreme Court precedent" articulated in *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), the five-year PRS term added to Earley's sentence by DOCS was invalid. *Earley I*, 451 F.3d at 76.

In denying the petition for rehearing ("*Earley II*"), the Second Circuit affirmed the Court's holding in *Earley I* and made clear that "the only sentence known to the law is the sentence imposed by the judge; any additional penalty added to that sentence by another authority is invalid, regardless of its source, origin, or authority until the judge personally amends the sentence." *Earley v. Murray*, 462 F.3d 147, 149 (2d Cir. 2006). The Second Circuit further explained, "[w]hether it is DOCS administrators or the operation of New York law that works the alteration, the alteration is of no effect." *Id.*

Two years after *Earley I* and *Earley II*, in *People v. Sparber* and *Garner v. New York State Dep't of Corr. Servs.*, the New York Court of Appeals determined that administratively-imposed PRS was also contrary to New York's Criminal Procedure Laws. *People v. Sparber*, 889 N.E.2d 459, 469-70 (2008) ("Thus, the procedure by which these sentences were imposed was flawed because the PRS component was

not 'pronounced' as required by CPL 380.20 and 380.40."); *Garner v. New York State Dep't of Corr. Servs.*, 889 N.E.2d 467, 470 (2008) ("The statute only permits challenges to judicially imposed sentences, not those administratively imposed by DOCS."). Following *Sparber* and *Garner*, the legislature enacted New York Corrections Law § 601-d, which "provides a mechanism for courts to consider resentencing defendants serving determinate sentences without court-ordered post-release supervision terms." *Garcia*, 2015 WL 1469294, at *2. The statute states, in part, "[w]henever it shall appear to the satisfaction of the department that an inmate in its custody or that a releasee under its supervision, [has an administratively-imposed supervised release term], the department shall make notification of that fact to the court that sentenced such person, and to the inmate or releasee." N.Y. Correct. Law § 601-d(2).

Following the state's legislative change, the Second Circuit issued a number of decisions refining the law related to liability for administratively-imposed PRS and any delay in providing the requisite notice to sentencing courts. For example, in *Scott v. Fisher*, the Second Circuit held that officials were entitled to qualified immunity for administrative imposition of PRS prior to *Earley I*, but expressly left open whether officials were entitled to qualified immunity for post-*Earley I* conduct. 616 F.3d 100, 107 (2d Cir. 2010). Then, in *Vincent v. Yelich*, the Second Circuit held that an individual's right not to be subject to administratively-imposed PRS was clearly established once *Earley I* was decided. 718 F.3d 157, 170 (2d Cir. 2013). As such, officials were not

entitled to automatic qualified immunity for post-*Earley I* conduct. The *Vincent* decision went on to explain that, following *Earley I*, "with respect to persons on whom PRS had been imposed administratively, the State was required either to have them resentenced by the court for the imposition of PRS terms in a constitutional manner or to excise the PRS conditions from their records and relieve them of those conditions." *Id.* at 172.

In this case, Defendants oppose Plaintiff's assertion that he is entitled to summary judgment on the limited issue of whether he served administratively-imposed PRS between January 17, 2008 and September 5, 2008. Defendants contend that "[t]he record establishes that Defendants did not enforce, at any time after June 9, 2006 (the date of *Earley [II]*), 'administratively imposed' PRS against Plaintiff." (Defs.' Mem. of Law in Supp. of Mot. for Summ. J. ("Defs.' MOL") at 12, ECF No. 97.) However, against the legal backdrop discussed above, Plaintiff's administratively-imposed PRS claim is limited, as a matter of law, to the time he served between January 17, 2008 and September 5, 2008 because that is the only PRS he served following the *Earley I* decision; and, Defendants' argument that Plaintiff did not serve administratively-imposed PRS during this period must fail. Defendants do not dispute that Judge Wexner did not pronounce a term of PRS at the March 14, 2000 sentencing. (Pl.'s Opp'n 56.1 Statement at ¶ 26; Defs.' Reply 56.1 Statement at ¶ 65.) Nor do Defendants dispute that it was DOCS that added the PRS term after the sentencing hearing. (*Id.*) Instead, Defendants argue that Plaintiff did not serve PRS because any time Plaintiff served on release fell within the time-frame

of a judge-imposed sentence. (Defs.' MOL at 13-16.) This interpretation has no basis in law. *See Vincent*, 718 F.3d at 170 (stating that "New York's Department of Correctional Services has no . . . power to alter a sentence") (quoting *Earley I*, 451 F.3d at 76). Indeed, Defendants' interpretation is directly at odds with the New York statute governing PRS. As Plaintiff notes, pursuant to N.Y. Penal Law § 70.45, PRS automatically commences upon an individual's release from imprisonment to supervision. And, once the PRS term commences, it interrupts any sentence of imprisonment and causes the remaining portion of any maximum term of imprisonment to be held in abeyance until an individual either (a) successfully completes the period of PRS, (b) is declared delinquent by parole, or (c) returns to DOCS custody. N.Y. Penal Law § 70.45(5)(a). If prior to the conclusion of an individual's PRS he is declared delinquent or returns to DOCS custody, the remaining term of PRS is held in abeyance until the individual is again released from DOCS custody. *Id.* This cycle continues until an individual has successfully completed the period of PRS.

As such, in accordance with the statute, Plaintiff began serving his five-year PRS term on November 27, 2001. The PRS clock stopped when he was declared delinquent by parole on May 8, 2004. Subsequently, on January 17, 2008, the PRS clock began to run again when Plaintiff was released from DOCS custody. And, the PRS clock continued to run until September 5, 2008, when Plaintiff was again declared delinquent by parole. Accordingly, Plaintiff's motion for partial summary judgment on the limited issue of whether he served

administratively-imposed PRS from January 17, 2008 to September 5, 2008 is granted.

II. Plaintiff Has Failed to Identify a Compensable Injury.

Defendants argue that even if Plaintiff served administratively-imposed PRS after *Earley I*, Plaintiff cannot prove a compensable injury as a matter of law. (Defs.' Reply Mem. of Law in Further Supp. of Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. at 6-8, ECF No. 105.) Specifically Defendants state, in part, that in the absence of a PRS term from January 17, 2008 to September 5, 2008, Plaintiff would have been subjected to the same or similar conditions while on conditional release in accord with his judicially-pronounced sentence. (*Id.* at 6-7.) On this issue, the Court agrees.

In a decision issued after briefing commenced, the Second Circuit made plain that a plaintiff cannot demonstrate entitlement to nominal damages for administratively-imposed PRS if the plaintiff "would have been subject to conditional release during [the relevant] time period had a PRS term not been imposed" and cannot demonstrate that "conditions of his PRS term were in any respect more onerous than those of conditional release would have been." *Hassell v. Fischer*, 879 F.3d 41, 51-52 (2d Cir. 2018). Here, Plaintiff would have been subjected to conditional release until August 21, 2009 had a term of PRS not been imposed. In addition, Plaintiff has failed to adduce facts suggesting that the PRS he served was in any way more onerous than conditional release. As such, Plaintiff's claim, premised upon the administrative imposition of PRS

from January 17, 2008 to September 5, 2008, must be dismissed for failure to establish a compensable injury.[8] *See id.* ("Without any showing of an adverse consequence during the three months after June 3, [plaintiff] has not suffered a denial of his due process rights during that period.").

CONCLUSION

For the foregoing reasons, Plaintiff's motion for partial summary judgment is granted on the limited issue of whether he served administratively-imposed PRS from January 17, 2008 to September 5, 2008. Defendants' cross-motion for summary judgment is granted in part, and denied in part. Defendants' motion is granted to the extent that it moves on the grounds that Plaintiff failed to establish a compensable injury and is denied in all other respects. The Clerk of Court is directed to enter judgment and close this case.

Dated: Brooklyn, New York
September 26, 2018

SO ORDERED:

/s/LDH
LASHANN DEARCY HALL
United States District Judge

[8] Having dismissed Plaintiff's claim, the Court need not reach the merits of Defendants' remaining arguments.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At the stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of December, two thousand nineteen.

ROBERT E. GARCIA,

Plaintiff-Appellant,

ORDER

v. Docket No: 18-3240

Michael Falk, Area Supervisor,
Queens III Parole, Victor Suero,
Parole Officer, Candace Benjamin,
Sr. Parole Officer,

Defendants-Appellees,

Division of Parole, Executive
Department, New York State
Department of Corrections,
Ames, Parole Officer, R. Chong,
Sr. Parole Officer,

Defendants.

Appellant, Robert E. Garcia, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolf, Clerk